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CAN COLLYER AND GARDNER-DENVER CO-EXIST? A POSTSCRIPT

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In the fall issue of this journal I argued that the Labor Board's *Collyer* doctrine,[1] under which the Board refuses to hear cases which could be submitted to arbitration, constitutes unwarranted deference to a tribunal not well equipped to deal with statutory claims under the National Labor Relations Act.[2] My argument assumed that adoption of the *Collyer* doctrine was within the Board's power. Since the article appeared the United States Supreme Court in *Alexander v. Gardner-Denver Co.*[3] has dealt with the relationship between arbitration and statutory claims under title VII of the Civil Rights Act of 1964.[4] The Court's opinion, written by Justice Powell, substantially undercuts the arguments which have been advanced on behalf of the *Collyer* doctrine and it raises the question whether the doctrine constitutes an abuse of discretion.

The Court in *Gardner-Denver* held unanimously that an employee who alleged that his discharge was racially motivated was entitled to pursue his claim under title VII even though it had already been rejected by an arbitrator in a grievance proceeding brought by the union.[5] Although the case deals with title VII rather than the NLRA, and the weight to be given to an already rendered award rather than with the question of deferral, it is difficult to see how the *Gardner* opinion and the *Collyer* doctrine can co-exist.

The *Collyer* doctrine rests in part upon the Board's desire to conform with the national policy of encouraging the use of arbitration to settle labor disputes.[6] The *Gardner-Denver* opinion makes clear, however, that this policy does not extend so far as to compel a preference for arbitration in the place of a statutorily created forum. As the Court stated:

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1. The doctrine was first stated in Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (Aug. 20, 1971).

2. The National Labor Relations Act is codified at 29 U.S.C. §§ 151-68 (1970) [hereinafter referred to as NLRA]; Getman, *Collyer Insulated Wire: A Case of Misplaced Modesty?*, 49 IND. L.J. 57 (1973) [hereinafter cited as Getman].

3. 42 U.S.L.W. 4214 (U.S. Feb. 19, 1974).

4. Title VII is codified at 42 U.S.C. § 2000e (1970), *as amended*, (Supp. II, 1972).

5. 42 U.S.L.W. at 4221.

6. *See, e.g.*, United Steel Workers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

> The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.[7]

Moreover, the Court in *Gardner-Denver* recognizes that arbitration is a poor forum for vindication of statutory rights. The Court wrote:

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitration must follow the agreement. . . . But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land.[8]

The Court also pointed out that the fact-finding process in arbitration "usually is not equivalent to judicial fact-finding."[9]

In *Gardner-Denver* the Court also summarily rejected the argument that resorting to arbitration or the promise to arbitrate constitutes a waiver of the right to pursue the statutory remedy, a claim which has been made in defense of the *Collyer* doctrine.[10] The Court stated, "[b]oth rights have legally independent origins and are equally available to the aggreived employee."[11] Indeed, the Court suggests that the union could not properly waive the statutory forum on behalf of the employee even if it chose to do so. Relatedly, the Court also refused to adopt a rule requiring federal courts to defer to already issued arbitration awards in certain defined circumstances. The result of such a rule would be

> to deprive the petitioner of his statutory right to attempt

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7. 42 U.S.L.W. at 4218.
8. *Id.* at 4220.
9. *Id.*
The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.
Id.
10. *See* Schatzki, *A Response to Professor Getman,* 49 IND. L.J. 76 (1973).
11. 42 U.S.L.W. at 4219.

> to establish his claim in a federal court. . . .
>
> . . . .
>
> Furthermore, we have long recognized that "the choice of forums inevitably affects the scope of the substantive right to be vindicated."[12]

The reasoning in *Gardner-Denver* is applicable to claims arising under the NLRA. The distinction drawn by the Court between statutorily created rights and forums and contractually created rights and forums is identical in the two situations. The procedural weaknesses in arbitration are the same under the NLRA as under title VII, as are the limits on the arbitrator's jurisdiction and competence.[13] In fact, the authority cited by the Court for the limited nature of the arbitrator's authority includes articles addressed mainly to the arbitrator's role in enforcing rights under the NLRA.[14] Thus, there is no more reason to imply a waiver of the statutory forum in NLRA cases than in those arising under title VII. The opinion itself recognizes the basic similarity of the two situatons:

> The resulting scheme is somewhat analogous to the procedure under the National Labor Relations Act, as amended, where disputed transactions may implicate both contractual and statutory rights.[15]

It could be argued that the *Gardner-Denver* opinion represents a special rule limited to allegations of racial discrimination. It may be that in such cases the arbitration process is particularly suspect as a technique for the vindication of individual rights.[16] However, the opinion does not stress this element. Its emphasis is on the role of the courts in the statutory scheme set up for the enforcement of title VII rights. This role, while important, is less significant than the role assigned to the Board in enforcing rights under the NLRA.[17]

The *Gardner-Denver* case involves the weight to be given to an already issued award, while the *Collyer* doctrine requires the Board to defer in the first instance subject to the possibility of assuming jurisdiction at a later time to protect statutory rights. But the *Collyer* doctrine is premised upon the willingness of the Board to give considerable weight

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12. *Id.* at 4220.
13. *See* Getman, *supra* note 2, at 57-63.
14. *See, e.g.*, 42 U.S.L.W. at 4219 n.16. There the Court cites Meltzer, *Ruminations About Ideology, Law, and Arbitrations*, 34 U. CHI. L. REV. 545 (1967).
15. 42 U.S.L.W. at 4218.
16. *See* Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 46-52 (1969).
17. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

to the arbitrator's award.[18] The Court refused to require this practice in title VII cases, and held that the district court should consider the case de novo. It based its conclusion on the grounds that

> Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assume the full availability of this forum.[19]

The *Collyer* doctrine is basically inconsistent with the full availability of the statutory forum. Indeed, its purpose is to have as many cases as possible finally decided by another forum. If the Board were to respond to the *Gardner-Denver* decision by not giving weight to arbitration awards once issued, it would undercut its own stated purpose and merely multiply the amount of litigation arising out of a single claim.

The *Gardner-Denver* decision should lead the Board to abandon the *Collyer* doctrine. If the Board does not do so, the Courts of Appeals should no longer treat *Collyer* as involving issues totally within the Board's discretion. The Supreme Court has now enunciated a national policy favoring the effectuation of statutory rights through the statutorily created agencies. The *Collyer* doctrine is fundamentally inconsistent with that policy.

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18. Collyer Insulated Wire, 192 N.L.R.B. No. 150, ——, 77 L.R.R.M. 1931, 1934 (Aug. 20, 1971).

19. 42 U.S.L.W. at 4221 n.21.

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